

The Legacy Outreach

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Case Analysis: In re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act, 1899

On December 13, 2023, the Constitution Bench of the Hon'ble Supreme Court of India overruled the majority ruling passed in the case of **N.N. Global Merchantile Pvt. Ltd. v. Indo Unique Flame Ltd** [1] by way of which unstamped arbitration agreements were held to be void and unenforceable. The overruling decision came as a huge relief to many stakeholders and legal professionals, who anticipated a substantial increase in litigation owing to the rather curable defect of stamping being held to be permanent and definitive by the majority judgment.

Upon a reference being made in relation to the aforementioned decision, the Hon'ble Overruling Bench, in the case which was deliberately named **In re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act, 1899** [2] (hereinafter referred to as 'the overruling decision') made several remarkable observations to remove the air of ambiguity and provide a harmonious construction between the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'Arbitration Act') and the Indian Stamp Act, 1899 (hereinafter referred to as 'Stamp Act'), by reading their provisions together, instead of over one another.

Circumstances leading to the Reference

The ramifications of the majority judgment passed in the case of N.N. Global were slowly taking effect through a few judgments passed in different courts.

There was also a reasonable fear that many parties, may utilize the judgment, for their own personal gains, by defeating the rights of the aggrieved merely on the basis of the fact that the agreements remained unstamped.

In fact, in the case of **Seka Dobric v. SA Eonsoftech Private Limited** (the case which led to the reference), one of the main objections taken by a party was the lack of stamping of the arbitration agreement, whereafter, the Ld. Bench acknowledged the substantial effect of the N.N. Global judgment and referred the point of law to the Constitution Bench, for further ascertainment. It is needful to mention, that the case of Seka Dobric is pending adjudication before the referring Bench.

Void or Inadmissible? That is the Question

The judgment passed by a majority of 3:2 held that "*the provisions of Sections 33 and the bar under Section 35 of the Stamp Act, applicable to instruments chargeable to stamp duty under Section 3 read with the Schedule to the Stamp Act, would render the Arbitration Agreement contained in such instrument as being non-existent in law unless the instrument is validated under the Stamp Act.*".

For long, the position held by the Stamp Act has been that of curability, wherein Section 35 (a) of the Act provides that the unstamped agreement shall become admissible if the duty is paid. The feature of voidability, being incurable, has not been exhibited by this enactment, in either of its provisions.

Furthermore, the Stamp Act has only dealt with the question of admissibility and not enforceability, wherein both such terms can be differentiated. Contrary to this, the Hon'ble Bench took a rather different stand and held that an arbitration agreement, if unstamped or insufficiently stamped shall be 'bereft of life' as being inadmissible and thus, the same shall be void. This judgment, thus, seemed to have lost hold of the difference and held the terms to be interchangeable and relatable.

The Constitution Bench, however, undertook a study of such difference and observed that the term 'void' related to the enforceability of the document in a Court of Law, while on the other hand, the term 'inadmissible' referred to the reliability of such document in the court. In light of this, the Bench made a strong observation, that Section 35 of the Stamp Act merely rendered the document **'inadmissible and not void'**.

It was observed that unlike the assumption made by the majority bench, the principle of Kompetenz-Kompetenz specified that the question of enforceability could only be determined by the Arbitral Tribunal and that the question would very well survive the issue of inadmissibility. It went on to hold that *"it is the arbitral tribunal and not the court which may test whether the requirements of a valid contract and a valid arbitration agreement are met. If the tribunal finds that these conditions are not met, it will decline to hear the dispute any further. If it finds that a valid arbitration agreement exists, it may assess whether the underlying agreement is a valid contract."*

Harmonious Construction and Generalia Specialibus Non-Derogant

The rule of generalia specialibus non-derogant specifies the supremacy of a special law over a general one.

In accordance with this rule, both the Arbitration Act and the Stamp Act hold a distinctive relevance over other laws, in view of their governance over a specific subject.

On the note of the precedence of the Stamp Act over the Arbitration Act, as held by the N.N. Global Judgment, the Hon'ble Constitution Bench, in the overruling case, observed that the Parliament, being the enacting body, was well aware of the existence of the Stamp Act, while enacting the subsequent Arbitration Act, and thus, it was, by intention, that no provision concerning stamping was added in the latter legislation.

Furthermore, it was also observed that the Parliament had the option of adding the mandate of Section 33(2) of the Stamp Act within Section 11 of the Arbitration Act, which was not the case. Thus, the Hon'ble Constitution Bench expressed the need to adopt the rule of harmonious construction and read both statutes in harmony with each other, which was held to be the primary intention of the Legislature. It was, in light of this intention, that the Hon'ble Constitution Bench held that *"the interpretation of the law must give effect to the purpose of the Arbitration Act in addition to the Stamp Act"*.

Ramifications of the N.N. Global Majority Judgment

Arbitration, as an alternative dispute resolution remedy, has been designed to be efficacious and non-time consuming. It was the primary intention of the legislature, to restrict judicial intervention from arbitration, by restricting the same only to the provisions provided within the Arbitration Act and not any further. In terms of this, the Courts were precluded from even determining whether the arbitration agreement, in itself, was enforceable and the question was left open for the Arbitrator.

The Hon'ble Bench in the N.N. Global case, by connecting inadmissibility with enforceability, and giving priority to the Stamp Act over the Arbitration Act, left a wide scope for litigation, thereby ultimately endangering the fundamental objective of the latter statute altogether.

Considering the possibility of this consequence, the Hon'ble Constitution Bench observed that the impounding of the arbitration agreement in line with the N.N. Global judgment, will not only delay the commencement of the arbitration but will ultimately lead to a delay in the case progress as well as add to the already burdened judicial docket, which is not a desired effect.

Ruling and Overruling

The Hon'ble Constitution Bench was not precluded by the fact that the majority decision of the N.N. Global case was based on the decision passed in the case of **SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd** [3], where a Bench of Two Hon'ble Judges of the Supreme Court, on similar lines, had held that unstamped arbitration agreements could not be acted upon.

Another judicial precedent forming part and parcel of the majority decision in N.N. Global was that of **Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.** [4], as per which unstamped arbitration agreements were held to be inexistent as a matter of law.

The Hon'ble Constitutional Bench, thus, took note of the aforementioned rulings and overruled both decisions, wherein the **Garware Ruling** was overruled to the extent of its observations pertaining to unstamped arbitration agreements.

While further overruling the judgment passed in the N.N. Global Case, the Hon'ble Constitution Bench also held that while unstamped agreements would be inadmissible, they could not be treated as void or even void-ab-initio. It was held that any objections pertaining to the stamping of the agreements would fall within the ambit of the Arbitral Tribunal and not under either Section 8 or Section 11 of the Arbitration Act.

With respect to the inadmissibility, the Court provided the defect to be rightfully curable, as intended by the Legislature.

Conclusion

As aforementioned, the majority decision of the N.N. Global case left a number of open questions with respect to the validity of arbitration agreements which were either unstamped or insufficiently stamped. By holding the agreements to be entirely unenforceable, the Hon'ble Court may have also opened the gates for litigation to enter into the sacrosanct chambers of arbitration.

The reference followed by the Constitution Bench overruling, thus came as a relief with respect to the pedestal held by the Arbitration Act and had the effect of removing substantial ambiguities which arose from the reading of both the Stamp Act and the Arbitration Act. By promoting a harmonious reading of the enactments, the Hon'ble Court upheld the sanctity of both statutes.

End-Notes

- 1.N.N. Global Merchantile Pvt. Ltd. v. Indo Unique Flame Ltd, (2023) 7 SCC 1.
- 2.In re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act, 1899, 2023 INSC 1066.
- 3.SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd, (2011) 14 SCC 66.
- 4.Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209.

Celebrating the Achievements of Legacy

It is an annual tradition for Legacy to celebrate the many achievements of its lawyers by designating this very column to their work.

This shout-out is our way of sharing our happiness with our readers and inviting them to be part of Legacy’s journey to success.

Rankings, Awards and Recognitions

The Legacy’s Hall of Fame was filled with a plethora of new awards, rankings, and recognitions during the period of 2023-24. Some of these awards include the following:

- *IFLR1000*

In its rankings for the year 2024, IFLR1000 ranked Legacy Law Offices LLP as a “Recommended Firm”, while individually ranking **Mr Gagan Anand** (Managing Partner), and **Ms Shalini Munjal** (Co-Managing Partner) as ‘Highly Regarded Lawyers’.

Not only this, but **Ms Munjal** also found recognition in the list of ‘Women Leaders’ while **Ms Eshjot Walia** (Associate Partner) was deemed as a ‘Rising Star’.

We congratulate all the lawyers, professionals and other staff of Legacy Law Offices LLP for making this feat possible.

IFLR 1000 Recommended Firm Legacy Law Offices India	IFLR 1000 HIGHLY REGARDED	IFLR 1000 WOMEN LEADERS	IFLR 1000 RISING STAR
2023	2023	2023	2023

- *India Business Law Journal*

For the second consecutive year, **Mr Anand** found his name included in the ‘A-List’ of Indian Lawyers published by the India Business Law Journal. This list is curated purely on the basis of recommendations given by individuals other than lawyers and law firms and seeks to enlist the Top 100 lawyers in the region.

We take pride in this achievement.



- *Chambers & Partners*

For his outstanding achievements in the field of Projects, Infrastructure, & Energy, **Mr Anand** was given recognition in the ‘Chambers & Partners Asia-Pacific Guide 2023’.



- *FIDIC Asia Pacific*

Mr Naman Anand, the newly added Associate Advocate was the recipient of a Commemoration Certificate issued by FIDIC Asia-Pacific for his inputs to the field of Projects and Energy. We congratulate him for this achievement.



Multi-party Arbitration and Consolidated Arbitration: Legality of the concept in India

The construction and infrastructure sector of any country is well known for its involvement in enhancing the economy. For developing countries like India, this sector, thus, has a vital role to play in supporting the per capita growth and ultimately driving the gross domestic product. In view of such an integral role, it has been essential for the industry to continue to adapt to the various advancements taking place at a global level, in order to decrease the expenditure and thereby increase the income of the nation. Furthermore, it has been incumbent on the industry to tackle a number of challenges, whether in terms of litigation or owing to its potential to significantly add to climate change.

The current infrastructure is evaluated on a completely different scale as compared to the previous developments due to a whole shift within the indicators stipulating the manner of implementation and the procedures involved in the development of projects. It has also witnessed new trends and development globally, to be able to tackle the challenges posed thereof. The recent trends in the construction sector are largely based upon the derived principles, sustainable developmental goals and the various policies and guidelines which are issued by various national and international organizations on a time-to-time basis.

For India, amongst the other issues being faced by the construction and infrastructure industry, litigation and the associated pendency have held a substantial pedestal.

It is undoubted that infrastructure projects hold high stakes and require the investment of great capital. In fact, with the popularity and need for public-private partnership projects in developing countries like India, many construction and infrastructure projects hold a place of national importance. In such situations, involvement of the project in complicated arbitration matters may lead to further loss to the public exchequer. It may, thus, be requisite for the industry to adapt to the various global trends existing in the area, which may help in the mitigation of risks associated with the project, thereby aiding in the avoidance of litigation.

An Overview of Challenges faced within the Construction/Infrastructure Projects

A construction/infrastructure project generally contains a large number of parties including contractors and sub-contractors, the roles of whom are inter-webbed in relation to a project, wherein such relationships are usually covered by a range of agreements. With such a high amount of interrelated rights and liabilities involved, these projects usually encounter frequent disputes and issues which require cost-efficient and speedy dispute resolution mechanisms, which help the parties in resolving their issues in a timely manner, thereby foregoing any loss to the project revenue.

International construction contracts are increasingly becoming complex and twisted in an attempt to safeguard the rights of all interested parties and stakeholders.

With the impossibility of undertaking the wide scope of every contract by a single contractor, contractors usually resort to sub-contractors for managing a part/section of the prescribed scope of work such as local sub-contractors for providing requisite assistance. With increasing complexity and dependability, the legal relations between the primary parties and sub-contractors become intermingled and result in complex legal issues and disputes during the project development stage. Additionally, the varied country-specific legislative framework and no unified international legislation for governing international construction contracts pose another hurdle towards the resolution of any disputes, which consequently results in the loss of manpower, money and timeframes.

Modern-day construction and infrastructure dispute projects involve several parties and sub-contractors that derive their rights and liabilities from the primary agreement. Even though the employer and sub-contractor are not directly accountable to one another, both parties are capable of claiming losses in the situation of breach by either of the parties, if it directly affects the other party.

With the indirect formation of such complex work arrangements, the “2017 FIDIC Conditions of Contract” specifically deals with the rights and liabilities of employers, contractors and sub-contractors in regard to their complex dependency and relationships that are involved within the contractual arrangement and provides detailed safeguards and methods to resolve the same.

Multi-Party Arbitration and Consolidated Arbitration, and its legality in India

With several international global trends witnessed within the International Construction Law such as Land and Environment, Social and Governance (ESG) concerns, automated techniques and technologies, FIDIC time-bar clauses, and Building Information Modelling (BIM), one of the popularly adopted trends in India is that of multi-party arbitration. This form of arbitration is widely used in resolution within the International Construction Law due to the complexity and severability of parties and related objectives, rights and liabilities of parties involved thereof.

Through this method, if a breach occurs on part of a sub-contractor, the authority which suffers a loss can file a claim against such sub-contractor instead of the concessionaire. Such severability of liabilities thus, helps in increasing the efficiency of arbitration.

On the other hand, in multi-party arbitration settings, the Arbitrator/Arbitral Tribunal allows the parties and claimants to have consolidated arbitration proceedings for claiming relief in case of interrelated disputes and parties arising out of a single construction/infrastructure project before a common Arbitrator/Arbitral Tribunal. This method enables all the parties, including the employer, contractor and sub-contractors to ensure timely and streamlined recovery towards posed claims. Multi-party arbitrations also ensure that the awards passed in case of different issues posed before different Arbitrators/Arbitral Tribunals do not provide contradictory results thereby further affecting the credibility of claims made by other parties.

The term consolidation in an arbitration proceeding is defined as “a procedural device which denotes the process whereby two or more claims are united into one single procedure concerning all parties and all disputes,”[1] and helps provide an effective dispute resolution resort for ensuring cost-effectiveness, timely recovery and speedy resolution. Multi-party arbitration in common Indian parlance is referred to as consolidated arbitration. The Arbitrators, Arbitral Tribunals as well as the Indian Judiciary have repeatedly supported the practice of consolidated arbitration proceedings and actively promote the same to avoid repetition and overlapping of arbitral proceedings in case of a common project/subject matter.

Journey through the Recent Judgments Concerning the Subject Matter

The Hon’ble Supreme Court in the case of **P.R. Shah, Shares & Stock Brokers (P.) Ltd. vs. B.H.H. Securities Private Limited & Ors**[2] observed that,

“If A has two separate agreements, one with B and another with C with regard to the same claim, and A has a claim jointly and severally against B and C, held, A can hold joint arbitration against B and C. Denial of single arbitration against B and C on the ground that arbitration agreements B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice”.

The Hon’ble High Court of Delhi in a recent judgment of **Jaiprakash Associates Ltd. vs. Micro and Small Enterprises Facilitation Council & Anr.**[3], affirmed the judgment of **Gammon India Ltd. & Anr. vs. National Highways Authority of India**[4] and held that,

“in case of multiple disputes arising out of the same or interlinked contracts, endeavour should be made that all such separate claims and disputes are adjudicated upon by the same Arbitral Tribunal so as to avoid multiplicity of proceedings and confusion”

The Hon’ble Supreme Court has read the principle of multi-party arbitration/consolidated arbitration within the sphere of Section 11 of the Arbitration and Conciliation Act, 1996. In the case of **Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc.**[5] wherein the Hon’ble Supreme Court held that a consolidated arbitration proceeding can be allowed for cases on the request of parties where:

1. A single economic transaction is involved.
2. Contracts which include a main contract and an ancillary contract.
3. When the doctrine of “group of companies” can be used.

However, the Court also found one exception to the above-stated rule in **Duro Felguera, S.A. vs. Gangavaram Port Ltd.**[6], wherein the Court held that even though the multiple parties and contracts were interrelated they could not be adjudicated by a single Arbitrator/Arbitral Tribunal as one of the matters was a domestic arbitration while the other was an international commercial arbitration that must be adjudicated separately.

In the case of **Libra Automotives Pvt. Ltd vs. BMW India Pvt. Ltd.**[7], the Hon’ble Delhi High Court clarified that the ‘overlapping disputes’ between parties that have incurred due to interrelated agreements cannot be the sole ground for the Court or parties to apply for consolidated arbitrations for different arbitration clauses provided within different arbitration agreements.

In one another contractual dispute pertaining to development of a construction project in **Zonal General Manager, IRCON Int Ltd. vs. Vinay Heavy Equipments**[8] wherein the Hon'ble Bench of Supreme Court dwelled within the intricate relationship formed between the Employer, Contractor and Sub-Contractor to ascertain whether two distinct but interrelated arbitration proceedings can be consolidated to be adjudged by a single Arbitrator/Arbitral Tribunal. The Court provided that,

"In the absence of covenant in the main contract to the contrary, the rules in relation to privity of contract will mean that the jural relationship between the employer and the main contractor on the one hand and between the sub-contractor and the main contractor on the other will be quite distinct and separate".

The Hon'ble High Court of Delhi in one of the other judgments, **Laxmi Civil Engineering Services Ltd. & Ors. vs. GAIL (India) Ltd.**[9] also dealt with a similar issue pertaining to the interpretation and treatment of contracts that can be constructed or adjudged within a single arbitration proceeding. The Court held that since there was no direct arbitration agreement between the Employer and the Sub-Contractor, the Employer cannot be compelled to participate in arbitration proceedings facilitated by the Sub-Contractor.

Conclusion

Reflecting upon the outlook of the Indian Judiciary on the practice of multi-party arbitration, it is assumed that the practice is yet to gain recognition as compared to consolidated arbitration that Arbitrators/Arbitral Tribunals have expressly preferred to ensure compliance and avoid redundancy in overlapping awards pertaining to related matters. However, to provide further clarity upon the practice, it is pertinent to include the same within the legislative framework of India that will subsequently enhance the faith of the public in the speedy resolution process and will help the construction and infrastructure sector to ensure speedy recovery and resolution. It will further aid Contractors, Employers and Subcontractors to ensure timely project development.

End-Notes

- 1.OECD "International Investment Perspectives Consolidation of Claims A Promising Avenue for Investment Arbitration?" (2006).
- 2.P.R. Shah, Shares & Stock Brokers (P.) Ltd. vs. B.H.H. Securities Private Limited and Others (2012) 1 SCC 594.
- 3.Jaiprakash Associates Ltd. vs. Micro and Small Enterprises Facilitation Council & Anr., LPA 565/2023.
- 4.Gammon India Ltd. & Anr. vs. National Highways Authority of India, 2020 SCC OnLine Del 659.
- 5.Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc., (2013)1SCC 641 (partly overruled by a 7-judge Bench in Cox & Kings Ltd. vs. SAP India Ltd., 2023 INSC 1051).
- 6.Duro Felguera, S.A. vs. Gangavaram Port Ltd., (2017) 9 SCC 729.
- 7.Libra Automotives Pvt. Ltd vs. BMW India Pvt. Ltd., ARB.P.163/2019.
- 8.Zonal General Manager, IRCON Int Ltd. vs. Vinay Heavy Equipments.
- 9.Laxmi Civil Engineering Services Ltd. & Ors. vs. GAIL (India) Ltd., ARB.P. 175/2020.

Around the World in 90 Days

India

- Changes to the Criminal Laws of India: On December 25, 2023, the President gave her assent to the three Legislations, namely 'Bharatiya Nyaya Sanhita', 'Bharatiya Nagarik Suraksha Sanhita' and the 'Bharatiya Sakshya Adhinyam' which replaced the previous enactments governing the criminal justice system of India.
- The Telecommunications Act, 2023: On December 27, 2023, the President of India gave assent to the passing of the Telecommunications Act, 2023, which seeks to replace the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933.
- University Grants Commission (Setting Up and Operation of Campuses of Foreign Higher Educational Institutions in India) Regulations, 2023: The Regulations, which were published by the University Grants Commission (UGC) on November 8, 2023, seek to regulate the granting of approval and certificates to foreign universities seeking to set campus in India, for facilitating the goal of the UGC to 'internationalize the Higher Education System' of the Country.

United Nations Climate Change Conference (COP28)

December 2023 was marked with the organization of the United Nations Climate Change Conference (COP28) in Dubai, which witnessed the participation of Leaders across the World.

During the various discussions and announcements, the conference was also a forum for a number of climate-conscious agreements, signed between parties. Some of these agreements have been highlighted below:

- *Global Stocktake:* COP28 marked the first time when the world undertook a global stocktake and called for the tripling of renewable energy capacity at a global level. This timeline for achieving this aim combined with that of substantially reducing non-CO2 emissions (including methane) was set to the year 2030.
- *Climate Finance:* In accordance with Article 9, paragraph 3 of the Paris Agreement, parties to the conference established the New Collective Quantified Goal for Climate Finance which shall be funded with USD 100 billion annually. The fund has been devoted to the 'needs and priorities' of Developing Countries.

The Conference also witnessed a number of other goals and priorities set by the Member Countries, including the green credit scheme, the global nuclear energy goal and other aims to tackle the adverse effect of climate change on the food industry.



Picture taken from the official United Nations Website, available at: <https://unric.org/en/climate-highlights-of-cop28/>

United Kingdom*

- UK-India Free Trade Agreement: In the ongoing Free Trade Agreement (FTA) negotiations between India and the UK, round 14 has been initiated and the countries are hopeful that the negotiations will culminate by the end of January 2024. Key updates with respect to FTA negotiations have been provided below:
 - The UK has reportedly been pushing for strengthened protection of their agricultural products under the Geographical Indication laws;
 - A call has been made for exemptions for Electric Vehicles, from both sides;

United States of America

- MoU for Strengthening Start-Up Eco-System: On December 15, 2023, the Prime Minister's Office of India published a press note announcing the approval of the Draft Memorandum of Understanding between India and the United States of America for the establishment of an 'innovative handshake' which shall aim towards cumulatively enhancing the growth of the two start-up ecosystems and tackling the regulatory hurdles together.
- Global Strategic Partnership: In the month of November 2023, the officeholders of both India and the United States of America held deliberations for strengthening the global partnership between the countries through the enhancement of the defence industry ties, Indo-Pacific engagement and boosting cooperation in the field of minerals and technology.

Greetings



Happy New Year!



Happy Independence Day!

Case Analysis: Cox & Kings Ltd. vs. SAP India Ltd., 2023 INSC 1051

Recently, a Bench comprising five Hon'ble Judges of the Supreme Court of India was called upon to determine the validity of the 'Group of Countries' doctrine in view of the fundamental principles enshrined under the Arbitration and Contractual laws of India.

The doctrine, by way of which, non-signatories were being arrayed as parties to arbitrations, has been subject to exhaustive debates owing to its adverse effect on the time-and-again upheld principles of party autonomy, privity of contract, and separate legal personality, wherein these principles have formed the whole and soul of the entire arbitration regime.

The issues framed under the case in question came to be referred by a three-judge bench of the Hon'ble Court (hereinafter referred to as 'the referring bench'), where it was opined that the judgment passed in the case of **Chloro Controls India Pvt Ltd vs. Severn Trent Water Purification Inc.**, [1] may have faltered in tracing the expression 'claiming through or under' from Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act'), which led to the opening of flood-gates for interpretation, thereby allowing an unencumbered inclusion of non-signatories to arbitration agreements.

Under reference, while answering the referring Bench's suspicions in the affirmative, the Hon'ble Five-Judge Bench held that the expression 'claiming through or under' merely provided for a 'derivative right', which could not be used as an umbrella to array non-signatories as parties to the agreement without reason.

This decision sought to bring much-needed clarity on the application of the doctrine in line with the principles of arbitration and further answered the various issues surrounding the judgment of the **Chloro Controls** case.

Owing to such a distinctive decision, it became necessary to understand the ratio decendi of the Five-Judge Bench decision, in order to fully comprehend the aspects and the possible impacts that the case may have in future litigations.

Facts

The initial dispute pertained to a set of 3 agreements signed between the parties for the development of software, where Clause 15.7 of the agreement dated 30.10.2015 contained an arbitration clause. Owing to the failure of Respondent No. 1 (hereinafter referred to as 'R1'), to complete the development in time, the contract and resources were rescinded, subsequent to which, the Applicant/Petitioner demanded a refund of INR 45 crores, allegedly spent towards the agreement. On 29.10.2017, after the disputes failed to be settled amicably, the R1 sent a Notice Invoking Arbitration (hereinafter referred to as 'NIA') to the Applicant/Petitioner claiming a wrongful termination of the contract. In such proceedings, Respondent No. 2 (hereinafter referred to as 'R2') was not a party to the arbitration and no objection regarding such non-inclusion was raised by the Applicant/Petitioner.

During the pendency of proceedings, a moratorium was initiated against R1 and the National Company Law Tribunal directed the party to adjourn the proceedings *sine die*.

Subsequently, the Applicant/Petitioner sent another NIA, wherein, R2 was arrayed as a fresh party. Owing to the lack of response by the Respondents to the NIA, the Petitioner/Applicant approached the Hon'ble Referring Bench seeking the appointment of an Arbitrator in an International Commercial Arbitration.

To justify the addition of R2 as a necessary party to the arbitration, the Applicant/Petitioner alleged that R1 was not only its wholly owned subsidiary but was also licensing the software in question from R2. It was thus claimed that all the agreements entered into between the parties formed a composite transaction and were interlinked. Taking shelter under the judgment passed in the **Chloro Controls** case, it was alleged by the Petitioner/Applicant that arbitration could be invoked against R2 as circumstances demonstrated that it was the mutual intention of the parties.

Concerns of the Referring Bench

While considering the submissions raised by the Applicant/Petitioner, the Bench undertook an exhaustive study of the **Chloro Controls** case, the rationale of the doctrine in line with the many decisions taken by different courts of various countries and the following changes to the law.

Ultimately, the Referring Bench observed as under,

"It may be noted that the doctrine, as expounded, requires the joining of nonsignatories as 'parties in their own right'. This joinder is not premised on nonsignatories 'claiming through or under'. Such a joinder has the effect of obliterating the commercial reality, and the benefits of keeping subsidiary companies distinct. Concepts like single economic entity are economic concepts difficult to be enforced as principles of law."[2]

It was thus observed that the judgement of **Chloro Controls** led to the creation of a broad-based understanding of the doctrine, the resultant effect of which was defeating the fundamental principle of party autonomy. In light of this, the Bench considered it appropriate to refer the issue of tracing the phrase 'claiming through or under' from Section 8 of the Arbitration Act, and reading the Act in line with the Doctrine, to a larger Bench, in order to settle the law, once and for all.

Discussion Undertaken by the Hon'ble 5-Judge Bench

The case before the Bench witnessed several profound arguments by Counsels, followed by a detailed study of the legal background, the existing laws and regulations, as well as the legislative intention behind the adoption of the doctrine as well as the enforcement of the Arbitration Act, by the Hon'ble Court.

On the issue of consent of non-signatory parties, the Hon'ble Bench observed that even though the Group of Companies doctrine was based on grounds which were similar to the other consent-based doctrines, it was implemented, *'albeit controversially, for identifying the real intention of the parties to bind a non-signatory to an arbitration agreement'*. It was specified that the concept of consent was vital to the law of Arbitration and thus, forcibly adding non-signatories as parties to arbitration, would defeat the fundamental principles encompassing the law.

The Hon'ble Bench also acknowledged the fact that situations may arise where, while parties may not be signatories to the arbitration agreements, they may give the appearance of being veritable parties owing to their legal relationship with the signatories.

Resultantly, the Hon'ble Bench called for a 'balanced approach' which would uphold both sides of the coin, vis-a-vis, an adequate application of the doctrine and the upholding of the fundamental principles of the arbitration and contractual law.

The Judgment

Within the 13-point directions, passed to ease the understanding concerning the group of companies doctrine and its application on arbitrations, the Hon'ble 5-Judge Bench held that the judgment of **Chloro Controls**, "to the extent that it traced the group of companies doctrine to the phrase "claiming through or under" was (sic) erroneous and against the well-established principles of contract law and corporate law".

It was further held that the requirement of a written arbitration agreement shall not preclude non-signatory parties from being bound and that the conduct of the latter could be claimed as an appropriate ground for arraying them as necessary parties.

In its bid to adopt a balanced approach, the Hon'ble Bench reiterated that the Doctrine has an independent existence stemming from a harmonious reading of Sections 2(1)(h) and 7 of the Arbitration Act and that Courts/Tribunals, while determining its application on cases, must take all those factors into consideration, which were laid in the case of **Oil and Natural Gas Corporation Ltd v. Discovery Enterprises Pvt. Ltd.** [3].

Analysis

"The general method to figure out the parties to an arbitration agreement is to look for the entities who are named in the recitals and have signed the agreement. The signature of a party on the agreement is the most profound expression of the consent of a person or entity to submit to the jurisdiction of an arbitral tribunal.

However, the corollary that persons or entities who have not signed the agreement are not bound by it may not always be correct." [4]

The Group of Companies Doctrine, in the context of arbitration, was adopted to allow Courts to evince the involvement and intentions of group companies, to arbitrate. The relevance held by the doctrine in the jurisprudence of many countries has been widely different. In India, however, this doctrine held a controversial stand, owing to its reading in line with the basic principles of the Arbitration Act and the Indian Contracts Act, 1872, vis-a-vis, party autonomy, privity of contracts and separate legal personality.

It may be necessary to reiterate that the judgment in the case of **Chloro Controls** provided for a 'broad-based understanding' with respect to the application of the doctrine by tracing its existence within the expression 'claiming through or under' as provided under Section 8 of the Arbitration Act.

By undertaking another reading of the judgment and the interpretation adopted by it with respect to the doctrine, the Hon'ble 5-Judge Bench has now provided a clear picture concerning its application in arbitration and its legal relationship with the aforementioned fundamental principles.

End-Notes

1. Chloro Controls India Pvt Ltd vs. Severn Trent Water Purification Inc., [1] (2013) 1 SCC 641;
2. Cox & Kings Ltd. vs. SAP India Ltd., 2023 INSC 1051;
3. Oil and Natural Gas Corporation Ltd v. Discovery Enterprises Pvt. Ltd., (2022) 8 SCC 42;
4. *Supra* note 2.

Legacy's Outreach: Lawyer Experiences

The last three months has witnessed an active participation from the lawyers of Legacy Law Offices LLP, in many conferences, seminars, workshops, and other networking events, across the globe. This section provides a brief insight into all such experiences.

- **FIDIC Asia-Pacific Conference, 2023**

Our Managing Partner, Mr Gagan Anand was accompanied by Mr. Naman Anand (Associate Advocate) at the FIDIC Asia Pacific Conference held in Bangkok between November 26-28, 2023. The conference was themed around the expression 'engineering towards net-zero' and comprised numerous thought-provoking sessions on the ways in which companies can contribute towards the mission of reducing their carbon footprint.



- **IBA Annual Conference**

Mr Gagan Anand and Ms Vandana Randhawa (Director) attended the Annual Conference, 2023, organized by the International Bar Association in Paris, France between October 9, 2023, to November 3, 2023. The conference provided an active opportunity for our Members to network with high-achieving professionals from around the globe and increase the reach of Legacy Law Offices LLP.



- **Indo-UK Legal Summit, 2023**

The Indo-UK Legal Summit 2023 was organized by the Association of Corporate Lawyers (ACL) in London on October 2-3, 2023. Attended by Mr Anand and Ms Randhawa, the Conference was also marked by the felicitation of Mr Anand, by a Sitting Member of the United Kingdom Parliament, for his contribution to the legal field.



Judicial Recap - Brief of the Judgments Passed in the Previous 90 Days

- **Sushma Shivkumar Daga and Another v. Madhurkumar Ramkrishnaji Bajaj and Ors., 2023 SCC OnLine SC 1683**

The issue faced by the Hon'ble Supreme Court pertained to the fact of whether the Application preferred under Section 8 of the Arbitration and Conciliation Act, 1996, was sustainable, in light of the dispute concerning a conveyance deed.

The Hon'ble Court took note of the conditions laid down in the case of **Rashid Raza v. Sadaf Akhtar**, (2019) 8 SCC 710, upon the satisfaction of which judicial authorities could refuse the reference to arbitration and held that the present case did not pass the test. It was held that, provided by the fact that the conveyance deed, forming the subject matter of dispute, contained an arbitration clause, there was no scope for refusing reference to arbitration.

- **Dilip B Jiwrajka v. Union of India & Ors. (WP (Civil) No. 1281 of 2021)**

The Constitution Bench, in the aforementioned case, upheld the validity of Sections 95 - 100 of the Insolvency and Bankruptcy Code, 2016.

Dispute pertained to the fact that there was a need for judicial determination towards the existence of a debt before the insolvency resolution proceedings were initiated and that the sections in question were arbitrary and against the principles of natural justice.

The Hon'ble Court answered the Petition in the negative and refused to hold the sections as being ultra vires in nature.

It was held that the procedure allowed the debtor to have an ample opportunity to participate in the proceedings before the Insolvency Resolution Professional, and thus it cannot be claimed that the same suffers from any irregularity.

- **Kanwar Raj Singh (D) Th. Lrs. v Gejo. (D) Th.Lrs & Ors.**

The Hon'ble Supreme Court, in the aforementioned case, held that any changes made to registered sale deeds, unilaterally, without the knowledge or consent of the other party are liable to be ignored.

While dealing with the case pertaining to the sale of land, the Hon'ble Court held that,

“The corrections unilaterally made by the first defendant after the execution of the sale deed without the knowledge and consent of the purchaser will have to be ignored. Only if such changes would have been made with the consent of the original plaintiff, the same could relate back to the date of the execution.”



Disclaimer

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The views expressed in this or any previously published newsletter do not necessarily constitute the final opinion of Legacy Law Offices LLP on the issues reported herein.

Specialist advice must be sought about specific circumstances.

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